A

DR PRITAM SINGH

v.

YAP HONG CHOON

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: W-02-918-2005]

C

17 AUGUST 2006

CIVIL PROCEDURE: *Pre-trial case management - Expert report on medical negligence - Application by defendant that parties to action furnish expert reports - Whether defendant entitled to pre-trial discovery -*

D

Whether reports privileged - Evidence Act 1950, s. 126(1) - Rules of the High Court 1980, O. 34 r. 4(2)(j)

EVIDENCE: *Expert evidence - Medical negligence - Pre-trial case management - Application by defendant that parties to action furnish expert reports - Whether defendant entitled to pre-trial discovery -*

E

Whether reports privileged - Evidence Act 1950, s. 126(1) - Rules of the High Court 1980, O. 34 r. 4(2)(j)

The respondent herein as plaintiff in the court below filed an action against the appellant as defendant for medical negligence.

F

After the action was filed the appellant *vide* summons in chambers applied for an order that the parties to the action herein exchange reports of their respective experts whom they propose to call at the trial. His application was dismissed. Hence, this appeal.

G

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The appellant's application was ill conceived. Firstly, by O. 24 r. 1(1) Rules of the High Court 1980 ('RHC'), the respondent

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was required to file and serve his affidavit making discovery of documents in his possession, custody or power. If the appellant was dissatisfied with the discovery made by the respondent, he might move the court for an order requiring

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the respondent to make further discovery. If for any reason the respondent did not disclose any document in his original affidavit of documents and failed to include it in an additional list verified by affidavit, the court might rule against the

production of such document at the trial. This was because an affidavit of documents was conclusive as against the oath of the party requiring the discovery and would be construed strictly. Secondly, the opinions of medical experts obtained by the respondent were the subject of legal professional privilege and hence protected from pre-trial discovery. The relevant provision was s. 126(1) of the Evidence Act 1950. It followed that the appellant was not entitled to have an exchange of the reports of medical experts and consequently for the orders prayed for in his summons. The present case was covered by O. 34 r. 4(2)(j) RHC which expressly makes a saving in favour of privileged information thereby enabling a party to a suit to raise a claim of privilege under s. 126(1) of the Evidence Act 1950. (paras 4, 5 & 8)

Bahasa Malaysia *translation of headnotes*

Responden di sini, iaitu plaintif di mahkamah di bawah, telah memfail tindakan kecuaian perubatan terhadap perayu selaku defendan di situ. Setelah tindakan difail, perayu memohon perintah melalui saman dalam kamar supaya pihak-pihak bertukar-balas laporan yang dibuat oleh pakar mereka masing-masing yang mereka akan panggil semasa perbicaraan. Permohonannya di tolak dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Permohonan perayu adalah terpesong. Pertama, berdasarkan A. 24 k. 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('RHC'), responden perlu memfail dan menyampaikan afidavit dengan menzahirkan dokumen-dokumen yang berada dalam milikan, kawalan dan penguasaannya. Jika perayu tidak berpuas hati dengan penzahiran yang dibuat oleh responden itu, beliau boleh memohon supaya mahkamah membuat perintah mengkehendaki responden membuat penzahiran lanjut. Jika, atas sebab-sebab tertentu, responden tidak menzahirkan apa-apa dokumen di dalam afidavit dokumen asalnya, serta gagal memasukkannya ke dalam senarai lanjutan yang disahkan melalui afidavit, mahkamah mungkin akan membuat perintah melarang pengemukaan dokumen tersebut di perbicaraan. Ini adalah kerana suatu afidavit dokumen adalah konklusif

terhadap sumpah yang dibuat oleh pihak yang mengkehendaki penzahiran dan ianya akan ditafsirkan secara ketat. Kedua, pendapat pakar perubatan yang diperolehi oleh responden adalah tertakluk kepada perlindungan undang-undang profesional dan dengan itu dilindungi dari penzahiran pra-perbicaraan. Peruntukan yang relevan adalah s. 126 Akta Keterangan 1950. Ianya mengikut bahawa perayu tidak berhak untuk mendapat pertukaran balas laporan-laporan pakar perubatan dan begitu juga dengan perintah yang dipohon melalui samannya. Kes semasa adalah dirangkumi oleh A. 34 k. 4(2)(j) RHC di mana terkandung peruntukan menyelamat untuk manfaat maklumat yang dilindungi, sekaligus membolehkan pihak kepada tindakan membangkitkan perlindungan di bawah s. 126(1) Akta Keterangan 1950.

Case(s) referred to:

Compagnie Financier et Commerciale du Pacifique v. Peruvian Guano Co [1882] 11 QBD 55 ***(refd)***

Framji Bhicaji v. Mohansing [1893] ILR 18 Bom 263 ***(refd)***

Gardner v. Irvin [1878] 4 Ex D 49 ***(refd)***

Hall v. Truman, Hanbury & Co [1885] 29 CLD 307 ***(refd)***

In re L (a Minor) [1997] AC 16 ***(refd)***

Jones v. Monte Video Gas Co [1880] 5 QBD 556 ***(refd)***

Lyell v. Kennedy [1888] 27 Ch D 1 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 126(1)

Rules of the High Court 1980, O. 24 r. 1(1), O. 34 r. 4(2)(f), (j)

Other source(s) referred to:

Bray, *The Principles and Practice of Discovery,* pp 211-212

For the appellant/defendant - Darryl SC Goon (Raja Eileen Soraya with him); M/s Raja Darryl & Loh

For the respondent/plaintiff - PS Ranjan (MS Dhillon with him); M/s PS Ranjan & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-22-595-2003]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] The plaintiff (respondent before us) was a patient of the defendant (appellant before us). He claims that he is a victim of the defendant's negligence. After the action was filed the defendant took out a summons in which he asked essentially for an order that the parties exchange reports of their respective experts whom they propose to call at the trial. The object of the application was clear enough. It was to shut out the plaintiff from calling an expert whose report had not been furnished to the defendant before hand. The application was resisted and failed. The defendant appealed to us. That appeal was dismissed. The reasons are now produced.

[2] The relevant rule of court that governs the exchange of expert evidence is O. 34 r. 4(2), paras (f) and (j) which empower a court to:

> (f) order either party to the action to furnish the report of an expert and fix the time for the delivery of such report;
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> and
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> (j) subject to all just exceptions as to privilege, direct the parties to make any disclosure or provide any information which the Judge considers relevant to the issues in the action.

[3] In resisting the appeal, counsel for the plaintiff said that these rules of court while they looked quite good on paper did not take into account the difficulties encountered by parties on the battle field of litigation. He drew our attention to the fact that the plaintiff had been examined by more than one doctor, including one or more doctors at the Hospital Kuala Lumpur. These doctors may not be – and are often not – prepared to give their reports in advance. One or more of them may have to be subpoenaed to produce their records and to give their opinions on oath. So, to tie the plaintiff's hands at this early stage of litigation is unjust to him. Counsel also argued that the medical reports, if any, procured by the plaintiff on the controversy in the suit are privileged and not subject to disclosure, save at the plaintiff's choice.

[4] In my judgment there is merit in the plaintiff's argument. I think that the defendant's application is ill-conceived. In the first place, the plaintiff is by O. 24 r. 1(1) required to file and serve his affidavit making discovery of documents in his possession, custody or power. If the defendant is dissatisfied with the discovery made by the plaintiff, he may move the court for an order requiring the plaintiff to make further discovery. If for any reason the plaintiff does not disclose any document in his original affidavit of documents and fails to include it in an additional list verified by affidavit, the court may rule against the production of such document at the trial. This is because an affidavit of documents is conclusive as against the oath of the party requiring the discovery (*Lyell v. Kennedy* [1888] 27 Ch D 1, at p. 19, per Cotton LJ) and will be construed strictly (*Gardner v. Irvin* [1878] 4 Ex D 49 (CA); *Jones v. Monte Video Gas Co* [1880] 5 QBD 556 (CA); *Compagnie Financier et Commerciale du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55 (CA); *Hall v. Truman, Hanbury & Co* [1885] 29 CLD 307 at 319). See also, *"The Principles and Practice of Discovery"* by Bray, at p. 211-212.

[5] In the second place, the opinions of medical experts obtained by the plaintiff are the subject of legal professional privilege and hence protected from pre-trial discovery. The relevant provision of the law is s. 126(1) of the Evidence Act 1950 which provides as follows:

> 126(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

[6] The section substantially reproduces the common law of England and English authorities are therefore relevant. See, *Framji Bhicaji v. Mohansing* [1893] ILR 18 Bom 263.

[7] In *In re L, (a Minor)* [1997] AC 16, Lord Jauncey of Tullichettle summed up the English common law of legal professional privilege as follows:

In *Reg. v. Derby Magistrates' Court, Ex parte B.* [1996] AC 487, the issue before this House was whether a witness summons could properly be issued to compel production by a prosecution witness in committal proceedings of proofs of evidence and attendance notes giving factual instructions to his solicitor in earlier criminal proceedings arising out of the same event in which he had been acquitted. Lord Taylor of Gosforth CJ, after analysis of earlier authorities, stated, at p. 507:

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

The concluding paragraph of his speech contained the following passage, at pp. 508-509:

> But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established.

All the other members of the appellate committee were in agreement with these views.

It is clear from the reasoning of the Lord Chief Justice and of the other members of the committee that the reference to legal professional privilege was in the context of the relationship between solicitor and client. Indeed, there was no occasion to consider whether and in what other circumstances absolute legal professional privilege might apply. Notwithstanding this, Miss Kushner maintained that the absolute nature of the privilege attaching to the solicitor – client relationship extended equally to all other forms of legal professional privilege.

My Lords, I reject this contention. There is, as Mr. Harris, for the city council and the police authority, pointed out, a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client for the purposes

of litigation. In the former case the privilege attaches to all communications whether related to litigation or not, but in the latter case it attaches only to documents or other written communications prepared with a view to litigation: *Waugh v. British Railways Board* [1980] AC 521, 533B, 537G, 544B. There is this further distinction that whereas a solicitor could not without his client's consent be compelled to express an opinion on the factual or legal merits of the case, a third party who has provided a report to a client can be subpoenaed to give evidence by the other side and cannot decline to answer questions as to his factual findings and opinion thereon. There is no property in the opinion of an expert witness: *Harmony Shipping Co. S.A. v. Saudi Europe Line Ltd.* [1979] 1 WLR 1380, 1386G, per Lord Denning MR.

Litigation privilege, as it has been called, is an essential component of adversarial procedure. In *Worrall v. Reich* [1955] 1 QB 296 it was held that one party to a litigation could not be compelled to produce to the other party a medical report obtained for the purposes of the action. This case was followed in *In re Saxton, decd.* [1962] 1 WLR 968 in relation to the report of a handwriting expert where Lord Denning MR said, at p. 972:

> In short, it is one of our notions of a fair trial that, except by agreement, you are not entitled to see the proofs of the other side's witnesses.

In *Causton v. Mann Egerton (Johnsons) Ltd.* [1974] 1 WLR 162, 170, which concerned the disclosure of medical reports in a personal injury action, Roskill LJ said:

> I am clearly of the view that this court has no power to order production of privileged documents. ... so long as we have an adversary system, a party is entitled not to produce documents which are properly protected by privilege if it is not to his advantage to produce them, and even though their production might assist his adversary.

Finally, in *Waugh v. British Railways Board* [1980] AC 521, 536 Lord Simon of Glaisdale said:

> This system of adversary forensic procedure with legal professional advice and representation demands that communications between lawyer and client should be confidential, since the lawyer is for the purpose of litigation merely the client's alter ego. So too material which is to go into the lawyer's (ie, the client's) brief or file for litigation. This is the basis for the privilege against disclosure of material collected by or on behalf of a client for the use of his lawyer in pending or anticipated litigation.

Lord Denning MR, Roskill LJ and Lord Simon of Glaisdale all emphasised the important part which litigation privilege plays in a fair trial under the adversarial system.

[8] Acting on well established principle, it is my judgment that the defendant is not entitled to have an exchange of the reports of medical experts and consequently for the orders prayed for in his summons. The present case, in my view, is covered by RHC O. 34 r. 4(2)(j) which expressly makes a saving in favour of privileged information thereby enabling a party to a suit to raise a claim of privilege under s. 126(1) of the Evidence Act. Accordingly, I am entirely in agreement with the order made by the learned judge at first instance.

[9] For the reasons already given, the appeal was dismissed and those orders usually consequent upon a dismissal were made.

[10] My learned brothers Hashim bin Dato' Haji Yusoff and Azmel bin Haji Maamor, JJCA have read this judgment in draft and have expressed their agreement with it.